Office-Supreme Court, U.S.
FILED
SEP 29 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-847 and 80-1067
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,
v.
HARRISON SCHMITT, *et al.*,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,
v.
AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

Of Counsel:
ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

LOUIS R. COHEN
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Appellants Common Cause, David Cohen and Winifred Long

September 29, 1981

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. SECTION 9012(f) APPLIES TO "INDEPENDENT EXPENDITURES" BY UNAUTHORIZED POLITICAL COMMITTEES IN SUPPORT OF PRESIDENTIAL CANDIDATES WHO HAVE CHOSEN TO ACCEPT PUBLIC FINANCING	3
A. The Plain Language of Section 9012(f) Covers "Independent Expenditures" by Political Committees	4
B. To Serve its Evident Purpose, Section 9012(f) Must Cover "Independent Expenditures" by Political Committees	5
C. The Legislative History of the Fund Act Supports the Plain Meaning of Section 9012(f)	6
D. The Commission Has Not Construed Section 9012(f) To Exclude "Independent Expenditures" by Political Committees	11
II. SECTION 9012(f) IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF IMPLEMENTING AN OPTIONAL SYSTEM OF PUBLIC FINANCING	13
A. Section 9012(f) Does Not Violate the First Amendment as Applied to Appellees	14
B. Section 9012(f) Is Not Vague, Overbroad, or Underinclusive	20
1. Section 9012(f) Is Not Vague or Overbroad	21
2. Section 9012(f) Is Not Underinclusive	25
III. COMMON CAUSE'S APPEAL ON THE SUBSTANTIVE ISSUES IS PROPERLY BEFORE THIS COURT	26
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

American Communications Association v. Douds, 339 U.S. 382 (1950) 24
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 7
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 24
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
California Medical Association v. FEC, 101 S. Ct. 2712 (1981) 19, 20, 22, 25
Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 5
Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) 19, 24, 25
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 4
Cort v. Ash, 422 U.S. 66 (1975) 27
County of Washington v. Gunther, 101 S. Ct. 2242 (1981) 5
FEC v. Florida For Kennedy Committee, 492 F. Supp. 587 (S.D. Fla. 1980) 22
FEC v. Machinists Non-Partisan Political League, No. 80-1136 (D.C. Cir. May 19, 1981) 22
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 14, 15
Grayned v. City of Rockford, 408 U.S. 104 (1972) .. 24
Howe v. Smith, 101 S. Ct. 2468 (1981) 4
Johnson v. Southern Pacific Company, 196 U.S. 1 (1904) 5
Katzenbach v. Morgan, 384 U.S. 641 (1966) 26
Martin Tractor Co. v. FEC, 627 F.2d 375 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980) 24
McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963) 27
Parker v. Levy, 417 U.S. 733 (1974) 25
Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) 14
Republican National Committee v. FEC, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980) 14
Ross v. Moffitt, 417 U.S. 600 (1974) 26

TABLE OF AUTHORITIES—Continued

	Page
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	26
United States v. Automobile Workers, 352 U.S. 567 (1957)	14
United States v. C.I.O., 335 U.S. 106 (1948)	14
United States v. Harriss, 347 U.S. 612 (1954)	21, 24
United States v. Turkette, 101 S. Ct. 2524 (1981)	4

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment	*passim*

FEDERAL STATUTORY PROVISIONS:

2 U.S.C. § 431(9)(A)(i) (Supp. III 1979)	13
2 U.S.C.A. § 437f(a)(1) (1981)	24
2 U.S.C.A. § 437f(c) (1981)	24
2 U.S.C. § 441a(a)(7)(B)(i) (1976)	6
2 U.S.C. § 441b (1976)	10
26 U.S.C. §§ 9002(11)(A)(i)-(iii) (1976)	13
26 U.S.C. § 9011(b) (1976)	27
26 U.S.C. § 9012(a) (1976)	9, 10
26 U.S.C. § 9012(b) (1976)	6
26 U.S.C. § 9012(f) (1976)	*passim*
I.R.C. §§ 527(e)(1), (2) (1976)	22
Act of June 25, 1910, ch. 392, Pub. L. No. 274, 36 Stat. 822 (1910)	25
Federal Corrupt Practices Act of 1925, ch. 368, Title III, 43 Stat. 1053, 1070 (1925)	25

CONGRESSIONAL MATERIALS:

40 Cong. Rec. 96 (Dec. 5, 1905)	25
117 Cong. Rec. 41767 (Nov. 17, 1971)	15
117 Cong. Rec. 41777 (Nov. 17, 1971)	7
117 Cong. Rec. 41780 (Nov. 17, 1971)	15
117 Cong. Rec. 41937-38 (Nov. 18, 1971)	15
117 Cong. Rec. 41939 (Nov. 18, 1971)	15
117 Cong. Rec. 41953 (Nov. 18, 1971)	7, 8
117 Cong. Rec. 41963 (Nov. 18, 1971)	15

TABLE OF AUTHORITIES—Continued

	Page
117 Cong. Rec. 42397 (Nov. 19, 1971)	9
117 Cong. Rec. 42398 (Nov. 19, 1971)	8, 9, 10, 11
117 Cong. Rec. 42592 (Nov. 22, 1971)	7
117 Cong. Rec. 42626 (Nov. 22, 1971)	23
117 Cong. Rec. 42631 (Nov. 22, 1971)	15
119 Cong. Rec. 38900 (Nov. 30, 1973)	2
127 Cong. Rec. H4911 (daily ed. July 27, 1981)	16
H.R. Rep. No. 78-2093, 78th Cong., 2d Sess. (1945)	22, 23
H.R. Rep. No. 92-708, 92d Cong., 1st Sess. (1971)	7
MISCELLANEOUS:	
11 C.F.R. §§ 110.8(g)(1)-(2) (1981)	13
D. Adamany, "Financing National Politics," in *The New Style in Election Campaigns* (R. Agranoff, ed., 1976)	16
Advisory Opinion 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206 (Aug. 12, 1976)	13
Common Cause Campaign Finance Monitoring Project, 1974 Congressional Finance: Vol. V, Interest Groups and Political Parties (1976)	18
D. Dunn, *Financing Presidential Campaigns* (1972)	16
Federal Election Commission, FEC Issues Final Summary Data on PAC Giving (Press Release, Aug. 4, 1981)	5, 18
Hearings on General Election Financing, June 25, 1976	12
Hearings on Part 109 (Independent Expenditures) June 9, 1976	11, 12
Informational Letter re: AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062 (Sept. 10, 1976)	13
The Wall Street Journal, Aug. 15, 1978 at 1, col. 6	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

INTRODUCTION

The fundamental error in appellees' argument is their limited vision of the objective of the public financing provisions, including Section 9012(f). The objective is not merely to eliminate the "*quid pro quo*" in the narrowest sense—mid-campaign promises of Presidential favors in return for support—but to fulfill Congress' larger vision, later expressed by Senator Pastore:

> "Let the President be a free and independent man. Let him not be beholden to anyone." 119 Cong. Rec. 38900 (Nov. 30, 1973).

The ideal of an independent Presidency extends to an entire Administration, including the White House staff and the political appointees in executive departments and agencies. These are the decision makers who have always been called upon—in AFC's eloquent phrase—to show "some measure of loyalty" [1] to those whose money helped the candidate win.

The Fund Act offers each major-party presidential candidate the option of freeing his administration from having to show such loyalty. Section 9012(f) makes that option real. Without Section 9012(f), the same people who would be raising contributions for the official campaign committees if the candidate had not accepted public funding would simply form "unauthorized" political committees and, without consultation, raise the same money for the candidate and spend it in the same ways as before. And others seeking to earn "some measure of loyalty" could also form "unauthorized" political committees to raise funds to make large expenditures, which become all the more important in a campaign from which contributions have been excluded. The pressure of—

> They raised and spent two million dollars for our candidate in the last election. Unless we show our loyalty and appreciation, they may not raise and spend it in the next election.

is just about as dangerous as—

> They contributed or raised contributions of two million dollars in the last election. They may not do it in the next unless we show our appreciation.

---

[1] Brief of Appellees Harrison H. Schmitt, Carl T. Curtis, and Americans For Change ("AFC Br.") 9, 44.

Section 9012(f) meets this problem by limiting "political committees"—organizations whose primary purpose is to raise money from outsiders and spend it to help their candidate win the election—to expenditures of $1000. The section was added to the Fund Act because Congress refused to ignore reality.

The court below, while denying discovery, decided the case on factual premises that differ sharply from Congress' perception of political reality.[2] We believe the congressional perception has such ample support in experience as to warrant dismissing the challenge to the constitutionality of Section 9012(f) on the present record. If the Court has doubt, however, then we submit that the Court should remand the cases for inquiry into the facts.[3]

ARGUMENT

I. SECTION 9012(f) APPLIES TO "INDEPENDENT EXPENDITURES" BY UNAUTHORIZED POLITICAL COMMITTEES IN SUPPORT OF PRESIDENTIAL CANDIDATES WHO HAVE CHOSEN TO ACCEPT PUBLIC FINANCING.

Appellants AFC and AEP contend that Section 9012(f) applies only to expenditures that "have been requested or authorized" by a publicly financed Presidential candidate.[4] This construction is inconsistent with the language and the logic of the Fund Act, and it is not sup-

---

[2] The district court's opinion is now reported at 512 F. Supp. 489.

[3] *See* Brief of Appellants Common Cause, David Cohen and Winifred Long (May 9, 1981) ("CC Br.") 41-44.

[4] AFC Br. 10; Brief of Appellee Americans for an Effective Presidency ("AEP Br.") 10. Appellee Fund for a Conservative Majority concedes that Section 9012(f) applies to all expenditures by political committees. Brief of Appellee Fund for a Conservative Majority ("FCM Br.") 3.

ported by legislative history or by actions of the Federal Election Commission ("Commission").

A. The Plain Language of Section 9012(f) Covers "Independent Expenditures" by Political Committees.

Section 9012(f) makes it unlawful—

> "for any political committee which is not an authorized committee . . . knowingly and willfully to incur expenditures to further the election of [a Presidential candidate who has chosen public financing] . . . in an aggregate amount exceeding $1,000."

As AEP acknowledges,[5] this language "literally" applies to its and AFC's expenditures, even if those expenditures were not requested or authorized by the official campaign. The court below correctly refused to create an exception inconsistent with what it called the "plain terms" of the statute.[6]

Given the clarity of the statutory language, this Court should decline even to consider the web of inferences AFC and AEP seek to weave out of provisions of other statutes, floor-debate remarks wrenched out of context, and post-enactment legislative history. "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 101 S. Ct. 2524, 2527 (1981), *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see Howe v. Smith*, 101 S. Ct. 2468, 2475 (1981).

---

[5] AEP Br. 4.

[6] 512 F. Supp. at 492, C.C. App. 7a.

B. To Serve its Evident Purpose, Section 9012(f) Must Cover "Independent Expenditures" by Political Committees.

Next to its plain language, the most important guide to the construction of a statute is its evident purpose.[7] Section 9012(f), read straightforwardly, forecloses a basic threat to integrity in the conduct of government: the claim to "some measure of loyalty" [8] from the President and his administration to those who (despite his decision to forego private fundraising) have organized a political committee to raise and spend money to help him win the election. Whether the managers of an unauthorized political committee are old friends of the candidate who operate the committee as an uncoordinated offshoot of the official campaign, or would-be friends seeking political credit for raising and spending large sums,[9] Section 9012(f) must cover the committee's expenditures to achieve its evident purpose.

On AFC's and AEP's construction, Section 9012(f) makes no sense. AEP offers no explanation of its purpose. AFC says that it "must be construed as a contribution limit"—*i.e.*, as a $1,000 limit on contributions in the form of coordinated expenditures.[10] But Section

---

[7] *See, e.g., Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165 (1980); *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14, 16-21 (1904). *See also County of Washington v. Gunther*, 101 S. Ct. 2242, 2252-53 (1981).

[8] AFC Br. 9, 44.

[9] The political action committees formed by labor unions and corporations are good examples. Currently, the PACs make contributions to candidates for the Senate and House of Representatives, but without Section 9012(f) they could as easily spend their enormous sums in a publicly-financed presidential campaign. In 1980, PACs contributed $55.3 million to congressional candidates. Federal Election Commission, FEC Issues Final Summary Data on PAC Giving (Press Release, Aug. 4, 1981).

[10] AFC Br. 13.

9012(b) bars acceptance of any contributions by a publicly financed Presidential candidate. To suppose that subsection (f) serves the purpose of putting a $1,000 limit on what subsection (b) has forbidden is absurd.

AFC replies that the word "contribution," as used in 1971 in Section 9012(b), must not have included coordinated expenditures.[11] There is no support for that supposition. When this Court in *Buckley* construed the term "contribution" to include "expenditures placed in cooperation with or with the consent of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 46-47 n.53 (1976), it was following what it understood was the congressional intent. In 1976, Congress codified the Court's elaboration, *see* 2 U.S.C. § 441a(a)(7)(B)(i) (1976), giving no indication that it thought it was changing the meaning of the term.[12]

C. The Legislative History of the Fund Act Supports the Plain Meaning of Section 9012(f).

The legislative history of the Fund Act reveals no intention to carve out an exception from Section 9012(f) for independent expenditures. The committee report and

---

[11] *Id.*

[12] AFC and AEP also argue that Section 9012(f) could not have been intended to cover independent expenditures because they were covered by the 1971 FECA. AFC Br. 14-17; AEP Br. 11, 14. But any overlap is at best partial: the 1971 FECA, when adopted, applied to all federal candidates, and to all spenders (including individuals), but to only some kinds of expenditures to further a candidate's election; Section 9012(f) applies only to expenditures by political committees on behalf of Presidential candidates who have chosen public financing, but within those narrower categories of candidates and spenders it applies to all expenditures to further the candidate's election. A mere partial overlap between provisions of different statutes pales in importance when compared to a flat contradiction between subsections (b) and (f) of the same section. Moreover, the 1971 FECA was not adopted until February 7, 1972, nearly two months after the Fund Act was signed into law.

the debates are consistent with the plain language and evident purpose of Section 9012(f).[18]

The legislative history contains several clear statements of the congressional intention. The Conference Committee Report states that Section 9012(f) makes it unlawful "for any committee which is not an authorized committee, to spend more than $1000 during the general campaign on behalf of the candidacy of the eligible candidates of a party." H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 57 (1971). There is no reference to an exception for "independent" expenditures. Senator Kennedy explained that under the Fund Act—

> "Unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1000." 117 Cong. Rec. 41777 (Nov. 17, 1971).

Senator Dole, in speaking against the Fund Act, said—

> "If that amendment [the Fund Act] passes we will have 'authorized' committees and 'unauthorized committees' . . . . The unauthorized committees could . . . solicit funds and use them for any purpose, provided they did not spend more than $1,000 to elect a President or Vice President." 117 Cong. Rec. 42592 (Nov. 22, 1971).

Senator Goldwater spoke unequivocally to the point at issue:

> "But what is there to stop me from supporting the candidate of my choice by forming a committee without his knowledge . . .? *This bill supposedly tries*

---

[18] AFC and AEP are attempting to impeach the plain language of Section 9012(f). "Before a court properly could consider taking such liberty with the statutory language there should be, at least, unmistakable support in the history and structure of the legislation." *Blue Chip Stamps v. Manor Drugstores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

to eliminate that . . . ." 117 Cong. Rec. 41953 (Nov. 18, 1971) (emphasis added).[14]

AFC's brief reprints Senator Goldwater's rhetorical question but omits Senator Goldwater's own immediate and decisive answer (italicized above).[15] AFC then jumps more than a column of dialogue to quote a significantly different question later posed by Senator Goldwater and Senator Pastore's reply:

> "*Mr. Goldwater.* . . . . Suppose [a candidate's] brother buys some time on television and the candidate says, 'I did not know my brother was spending money that way.' There is no way we can prevent that."
>
> * * *
>
> "*Mr. Pastore.* That is covered by S.382 [FECA]. I keep repeating that. What we are trying to do is to characterize this particular bill [the Fund Act] as complementary legislation on campaign expenditures and campaign financing. This is the financing part . . . ." [16]

Senator Pastore's answer—on which AFC relies heavily—was not in response to Senator Goldwater's much earlier question about an unauthorized committee (quoted above and answered by Senator Goldwater himself), but to his much later question about an individual. Senator Pastore's statement that the case of an individual purchasing campaign advertising "is covered by S.382" reflects only his recognition, clear at other points in the debates as well,[17] of the constitutional difference between

---

[14] Senator Goldwater went on to voice doubts as to the Fund Act's constitutionality, a view with which we obviously disagree.

[15] AFC Br. 16.

[16] AFC Br. at 16, *quoting* 117 Cong. Rec. 41953 (Nov. 18, 1971).

[17] *See, e.g.*, 117 Cong. Rec. 42398 (Nov. 19, 1971) (remarks of Senators Taft and Pastore).

restrictions on political committees and restrictions on individuals.

AEP makes similarly creative use of scissors, truncating the debate between Senators Taft and Pastore and leaving a misleading impression of what it was about. Contrary to the impression AEP seeks to create, the senators were not debating whether to limit Section 9012(f) to coordinated expenditures but whether to expand Section 9012(f) to cover groups other than political committees.

The debate began at 117 Cong. Rec. 42397, a page earlier than AEP's quotations begin.[18] Senator Taft said, "I concur with the purposes of this section [which became 9012(f)]." He then proposed to expand it to reach organizations that would not be covered by the term "political committee":

> "The language in my amendment would delete the words 'political committee' in line 4 and substitute the words 'any corporation, labor organization, partnership, association, political committee, political education committee or any other committee.'"

He then explained his purpose:

> "In mentioning political committee, as the present . . . bill does, the desire, of course, is to prevent any political committees from being formed as a subterfuge so that they can go out beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill.[19]

---

[18] The statements quoted by AEP appear at 117 Cong. Rec. 42398.

[19] This sentence is not easy reading. It becomes clear, however, if one reads the concluding phrase as referring to "the limitations of expenditures which are in *other parts of* the bill," *i.e.*, Section 9012(a), which limits expenditures by the candidate and his au-

> "My purpose is to apply that same restriction to any other type of organization. I might point out that it does not include an individual. An individual, I believe, should be able to make any kind of expenditure or effort he wants to himself on behalf of a presidential candidate or a party in whom he has confidence and desires to support."

Senator Taft appears to assume that all expenditures by unauthorized political committees are and should be covered by Section 9012(f). His point is that Section 9012(f) should be expanded beyond "political committees" to "any other type of organization."[20] The ensuing debate, quoted at length at pages 12-14 of AEP's brief, was about that ultimately rejected proposal. Thus, when

---

thorized committees. Senator Taft read Section 9012(f) to prevent an unauthorized political committee from being used as a subterfuge to get around Section 9012(a).

[20] Senator Taft was seeking chiefly to bring the expenditures of labor unions not prohibited by 18 U.S.C. § 610 (now 2 U.S.C. § 441b (1976)) within the section. Section 9012(f)(2), which now provides an exception for labor unions to communicate with their members, had not yet been added to the bill. Apparently Senator Taft and other Senators were proceeding on the assumption that a labor union is not a "political committee" because its primary purpose is not the election of a candidate or candidates for office. They may well have been making the same assumption about COPE and any other labor union political action committees because the committees claimed their expenditures were for educational advice to members.

AEP contends Senator Taft made statements indicating he doubted that Section 9012(f) would cover AMPAC. AEP Br. 13. But Senator Taft's remarks can more fairly be read to suggest that he believed Section 9012(f) would cover AMPAC and should be expanded to cover other groups as well. *See* 117 Cong. Rec. 42398 (Nov. 19, 1971). Even if AEP's reading were correct, the remarks would shed little light on the proper construction of Section 9012(f), because Senator Taft gave no indication as to why he might have thought that AMPAC was not covered.

Senator Pastore, responding to Senator Taft, argued that the law should not reach "a committee of faculty members say at Columbia University who might get together and buy radio time . . . to broadcast their support," [21] he was arguing against deleting the narrower term "political committee" and replacing it with broader language that would reach groups that do not raise money from outsiders; he was neither assuming nor arguing that Section 9012(f) would limit only coordinated expenditures.[22]

D. The Commission Has Not Construed Section 9012(f) To Exclude "Independent Expenditures" by Political Committees.

The claims of AFC and AEP that prior Commission actions support their position [23] lack foundation. The Commission has not previously spoken on the issue.

Appellees cite the failure of the Commission in 1976 to adopt a proposed regulation that AFC says "tracked the language" of Section 9012(f).[24] Adoption of a regulation tracking the language of Section 9012(f) would have added nothing. The failure to adopt such a regulation subtracts nothing.[25]

---

[21] 117 Cong. Rec. 42398 (Nov. 19, 1971).

[22] The Taft Amendment, and both Senators throughout their dialogue, use the term "committee" to include organizations that are not "political committees."

[23] AFC Br. 24-25; AEP Br. 18-20.

[24] AFC Br. 24; *see* AEP Br. 18.

[25] AFC's and AEP's assertion that it was assumed, in the Commission's 1976 hearings, that Section 9012(f) did not apply to independent expenditures, is wrong. For example, Robert Thomson, on behalf of the Democratic Senatorial Campaign Committee, testified as follows:

> "A license for unlimited 'independent' spending would make a farce of . . . the expenditure limitations imposed on Presi-

The two advisory opinions AEP cites have no bearing on the question.[26] In "GOP Feminist Caucus," the organization requesting the opinion stated it intended to spend less than $1,000, the Commission expressed doubt whether the group was a "political committee," and it

---

dential candidates that accept payments under Chapter 95 of the Internal Revenue Code....

"In fact, the Court [in *Buckley*] specifically found that Subtitle H was constitutional. Consequently, the national committees are prohibited by Section 9012(f) from making independent expenditures in excess of $1000 in the general election, no matter what the proposed regulation eventually says.

* * * *

"Some may claim that Section 9012(f) should not be enforced since the *Buckley* Court overturned similar independent expenditure limits in what formerly was Section 608(e) of Title 18. However, the limitation in Section 9012(f) is more narrowly drawn. It applies only to political committees, whereas Section 608(e) applied to all 'persons.'

"Moreover, it applies only to general election campaigns for President where candidates may receive 100 percent public financing, whereas Section 608(e) applied to all federal elections." Hearings on Part 109 (Independent Expenditures) June 9, 1976, at 275-77.

The Commission's then General Counsel answered a question about what Congress intended: "The way I look at it, they tried to put a $1000 limit on independent political committee expenditures...." (He went on to question the constitutionality of that step in light of *Buckley*.) Hearings on General Election Financing, June 25, 1976, at 39.

Commissioner Springer, worried that the $1,000 represented a loophole, said "[I]t looks to me as if Congress has deliberately left an exception for any group of people to get together and spend up to not exceeding $1000." *Id.* at 89.

[26] AEP Br. 19. The one instance where the Commission was asked for an advisory opinion about Section 9012(f) was AEP's request, but AEP withdrew its request rather than receive the Commission's reply. *See* Letters from Roderick M. Hills to FEC, May 15, 1980, and July 1, 1980.

appears the question arose in the context of spending in the primary rather than the general election.[27] It is no surprise that the Commission did not mention Section 9012(f), which applies only to expenditures over $1,000, only to "political committees," and only in the general election. "Citizens for Carter" [28] is even a weaker reed: it was appropriately limited to the narrow question posed, which concerned the proper form of a disclaimer.

AFC's reliance on Commission regulations explicating the term "qualified campaign expenses" [29] is also misplaced. "Qualified campaign expenses" is defined in the statute as expenses "by the candidate" or "by an authorized committee of the candidate[]." 26 U.S.C. §§ 9002(11)(A)(i)-(iii) (1976). The regulations explicating that term naturally reflect the fact that such "qualified campaign expenses" are by definition not independent.[30] The term in Section 9012(f) with which this case is concerned is the much broader term "expenditures," a term defined in a way that is not limited to coordinated expenditures. *See* 2 U.S.C. § 431(9)(A)(i) (Supp. III 1979).

II. SECTION 9012(f) IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF IMPLEMENTING AN OPTIONAL SYSTEM OF PUBLIC FINANCING.

Appellees' arguments under the First Amendment fall into two categories. First, they argue that Section 9012(f) is unconstitutional as applied to them. Second, they argue that even if Section 9012(f) would be con-

---

[27] Informational Letter re: AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062 (Sept. 10, 1976).

[28] AO 1976-35, *id.* ¶ 5206 (Aug. 12, 1976).

[29] AFC Br. 11-12.

[30] The definition of the term "on behalf of" in 11 C.F.R. §§ 110.8(g)(1)-(2) (1981) is too narrow even to reach most coordinated expenditures.

stitutional as applied to their activities, its language is either too vague and broad or too narrow. Both arguments lack merit.

A. Section 9012(f) Does Not Violate the First Amendment as Applied to Appellees.

Appellee political committees were formed for the primary purpose of helping to elect federal candidates. They aggregated millions of dollars through mass mailings that sought neither ideas nor words but only money for political advertising. They then used the money they raised to supplement the campaign of a Presidential candidate who had voluntarily declined private financial support, doing the same things official committees would have done if the candidate had not chosen public financing.

There is no absolute First Amendment right to engage in such activity. Appellees' suggestion[31] that *Buckley* stands for the proposition that all expenditure limits are unconstitutional is wrong.[32] For example, a publicly financed Presidential candidate does not have a right to make unlimited expenditures,[33] and labor unions and corporations do not have a right to make independent expenditures to support candidates.[34] Where, as here, a

---

[31] AFC Br. 7, 26-32; AEP Br. 28, 30; FCM Br. 10-13.

[32] *See* CC Br. 18-19.

[33] *Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

[34] *Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978); *see Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972); *United States v. Automobile Workers*, 352 U.S. 567 (1957); *United States v. C.I.O.*, 335 U.S. 106 (1948).

Appellees' heavy reliance on *Bellotti* is misplaced. Contrary to their implication, the case did not hold either that the source of speech is irrelevant to the First Amendment balancing test or that organizations have the same First Amendment rights as individuals. As Justice Powell's opinion made clear, the Court

limitation is designed to eliminate a serious public evil (other than any danger supposedly inherent in the content and impact upon the public of the ideas expressed), speech and associational rights must be balanced against the needs of the public, and a narrowly drawn statute will be sustained.[35]

Appellees' problem is that the only governmental interest they see is to prevent *"quid pro quos"* in the narrowest sense—mid-campaign exchanges of contributions for promises.[36] But Congress had a larger objective—to give the candidate the option of freeing himself from dependence on private fundraising[37]—and Congress plainly believed that Section 9012(f) is necessary to curb activities that would undermine the concept of public financing as a "substitute" for private financial support. *See Buckley*, 424 U.S. at 99.

Appellees' case ignores several political realities that Congress appreciated:

First, financial support for a candidate leads to beholdenness and the appearance thereof. Justin Dart, the chief sponsor of one of the largest industrial political action committees, put the point crisply when he said

---

there had no "occasion to consider whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." 435 U.S. at 777-78 n.13. *See also* CC Br. 18 n.28, 22.

[35] *See id.* 15-23.

[36] AFC Br. 36; *see also id.* at 8, 45; AEP Br. 33; FCM Br. 27.

[37] *See* CC Br. 25-26, 32-33. *Accord, e.g.*, 117 Cong. Rec. 41937-38 (Nov. 18, 1971) (Senator Mansfield) ("some form of public financing is the only way to put an end to the day of 'labor's' man or 'industry's' man; . . . under this amendment, he would be the people's man."); *id.* at 41780 (Nov. 17, 1971) (Senators Hart and Eagleton); *id.* at 41939 (Nov. 18, 1971) (Senator Pastore); *id.* at 41963 (Senator Long); *id.* at 42631 (Nov. 22, 1971) (Senator Spong); *id.* at 41767 (Nov. 17, 1971) (Senator Cannon).

that dialogue with politicians "is a fine thing, but with a little money, they hear you better." [38]

Second, in an election from which contributions are excluded, financial support in the form of expenditures leads to the same problem of beholdenness. As Douglas L. Bailey, one of AEP's media directors, said:

> "The people who wield the authority coming out of private fundraising are not the people who give the money so much as the people who raise the money. . . ." Deposition of Douglas L. Bailey at 28 in *Republican National Committee v. FEC*, *supra*.

A particularly unsubtle example may illustrate the point. NCPAC is an "independent" political committee that spent over $2 million in the 1980 Presidential campaign. In 1981, NCPAC's National Chairman wrote Congressman Neal:

> "If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes." 127 Cong. Rec. H4911 (daily ed. July 27, 1981).

Third, coordination with the candidate's campaign is not a prerequisite to beholdenness. The candidate will certainly know about a multimillion dollar "X for President" campaign conducted by his friends and would-be friends, and he may owe his election to it. The administration of a President who has benefited from efforts to raise and spend tens of millions of dollars for ads supporting his candidacy is not "free and independent" merely because he did not talk to any of the political

---

[38] *The Wall Street Journal*, Aug. 15, 1978 at 1, col. 6. Evidence that campaign support buys influence is, of course, abundant. *See, e.g.*, D. Adamany, "Financing National Politics," in *The New Style in Election Campaigns* 395-97 (R. Agranoff, ed., 1976); D. Dunn, *Financing Presidential Campaigns* 19-21 (1972). *See also* note 37, *supra*.

committee organizers for a few months after he was nominated.

AFC admits as much, although it attempts to downplay the significance of this telling admission by using euphemisms:

> "no problem of corruption is created when a political committee (or any person) earns *some measure of loyalty* from a candidate because it effectively advocates the candidate's election." AFC Br. 44 (footnote omitted) (emphasis added).[39]

The "loyalty" AFC is talking about is an obligation of a successful candidate and his administration, owed not to an idea or to all the people but to a political committee and its organizers, as such, on account of the money they raised and spent "effectively advocating" his election. Experience has taught us just what such "loyalty" entails.

Appellees suggest that their expenditures may do more harm than good and, therefore, cannot create political debts.[40] At best, that factual assertion, made by the court below as well,[41] serves as a reminder that the court struck down Section 9012(f) without permitting appellants to offer proof that independent expenditures by political committees can be counted on (by both the candidate and the political committee) to help rather than hurt. Appellees' assertion also conflicts with their boasts

---

[39] *See also* AEP Br. 33-34.

[40] AFC Br. 40 n.45; AEP Br. 31-32; FCM Br. 27. The principal factual basis advanced by AEP for such a finding is that independent committees do not have access to the opinion polls that the official campaign uses and that, even if they did, the independent committees would probably draw different conclusions about which campaign tactics would be most useful. AEP Br. 31-32. *But see* CC Br. 10 & n.18 (describing use of common pollsters, consultants and other common vendors by political committees and the official campaign).

[41] 512 F. Supp. at 495, C.C. App. 12a.

to their contributors about how essential the committees' activities were to their candidate's election.[42]

"Independent" political committees operating in a publicly financed Presidential general election can be far more effective than was apparent when the Court questioned the effectiveness of the kind of independent expenditures at issue in *Buckley*. *See* 424 U.S. at 47. Political committees, whose primary purpose is, by definition, to further the election of a candidate, do not need to be told by the official campaign that straightforward, massive media advertising will help. Nor do they need to be told how to do it (particularly where, as here, they hire the same consultants and media experts used by the official campaign).[43]

Fourth, what in 1980 may have been viewed only as the luxury of an extra few millions of advertising dollars will become the necessity of extra tens of millions if Section 9012(f) is struck down.[44] And the successful candidate will be, and will appear to be, beholden to those who organize and manage the political committees that raise those tens of millions to help him win.[45]

On the other side of the balance, Section 9012(f) does prevent the organizers and managers of political committees from earning "some measure of loyalty" by raising and spending other people's money. But their right to raise and spend other people's money is at best en-

---

[42] *See, e.g.*, CC Br. 6-7.

[43] *See id.* 9-10 and n.19, 31-32.

[44] According to the Commission's records, PAC contributions to Congressional candidates have quadrupled from $12.5 million in 1974 to $55.3 million in 1980. *Compare* Common Cause Campaign Finance Monitoring Project, 1974 Congressional Finance: Vol. V, Interest Groups and Political Parties at xii (1976) *with* Federal Election Commission, FEC Issues Final Summary Data on PAC Giving (Press Release, August 4, 1981).

[45] *See* CC Br. 26-34.

titled to less protection than their personal speech,[46] which Section 9012(f) does not curtail at all. The Nation's interest in giving the presidential candidate the option to remain "a free and independent man" plainly outweighs any burden on their activities.

Hence appellees, like the court below, place primary stress on the argument that Section 9012(f) prevents their *contributors* from engaging in a significant political speech.[47] But appellees did not seek words or ideas from their contributors, only money. This Court held in *Buckley* and reaffirmed in *California Medical Association v. FEC*, 101 S.Ct. 2712 (1981), that limiting the opportunity to give money to a campaign organization "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. Contributions of money to political committees show at best only "undifferentiated, symbolic" support for the candidate. *Id.* They involve only "marginal" First Amendment interests. *Id.* at 20. *California Medical Association* reaffirmed that

> "[T]he 'speech by proxy' that [a contributor] seeks to achieve through its contributions to [a political committee] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First

---

[46] In upholding broad restrictions on the partisan political activities of five million federal employees, this Court specifically approved prohibitions against soliciting money for partisan purposes and against managing campaign organizations. *See Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 578 n.21 (1973). At the same time, the Court declined to decide what it regarded as the more serious constitutional question of whether prohibitions on partisan endorsements by individuals through the media would violate the First Amendment. *Id.* at 580-81. *Buckley* reaffirmed the importance of the line drawn in *Letter Carriers*. 424 U.S. at 48 n.54.

[47] AFC Br. 31-32; AEP Br. 27-28; FCM Br. 23. *See* 512 F. Supp. at 496-97, C.C. App. 15a-17a.

> Amendment protection . . . . Of course, [a contributor] would probably not contribute to [the committee] unless it agreed with the views espoused by [the committee], but this *sympathy of interests alone does not convert* [*the committee's*] *speech into that of* [*its contributors*]." 101 S. Ct. at 2721-22 (emphasis added).[48]

Nor is appellees' First Amendment argument enhanced by describing the same restriction as a burden on the associational freedom of those who would contribute to an unauthorized political committee. The only associational freedom Section 9012(f) limits is one that involves little associating and much donating. That restriction is of the kind *Buckley* sustained, 424 U.S. at 24-29, and it is justified for the same reasons as the restraint on the ability of the managers of the political committee to raise and spend aggregated funds on behalf of a publicly financed candidate.

The suggestion that for a nonwealthy individual a contribution to an unauthorized political cammittee is "the only remaining legal avenue for effective political participation in presidential elections"[49] is way off the mark. There remain many expressive and supportive activities other than giving dollars to appellees.[50]

B. Section 9012(f) Is Not Vague, Overbroad, or Underinclusive.

Appellees, invoking hypothetical applications of Section 9012(f) to activities that do not resemble anything before the Court, ask the Court to find Section 9012(f)

---

[48] Like CALPAC, the political committee in *California Medical Association*, appellees are "multicandidate political committees" that make contributions to candidates as well as expenditures. See the data the Commission lodged with the Court.

[49] AEP Br. 35.

[50] *See* CC Br. 38-41.

unconstitutional because of alleged vagueness, overbreadth, or underinclusiveness, even if it clearly and properly applies to them. A proper, historically sound definition of the term "political committee" puts to rest all of appellees' conjectures.

1. *Section 9012(f) Is Not Vague or Overbroad.*

Appellees argue that Section 9012(f) chills or restricts expression of personal views, discussion of political issues, and even scholarly research. Those arguments evaporate when "political committee" is given its "commonly accepted sense," *United States v. Harriss*, 347 U.S. 612, 620 (1954). A political committee is an organization that raises money from outsiders and spends it primarily to promote the election of political candidates.[51] That meaning is reflected in decisions of this Court and it is quite evidently what Congress had in mind when considering the Fund Act and prior legislation.

The Court has already drawn a clear line between a "political committee" and an issue-oriented organization. *Buckley* construed the term "political committee" to encompass only "organizations . . . the major purpose of which is the nomination or election of a can-

---

[51] Section 9012(f) need not be construed to encompass only expenditures that in express terms advocate election or defeat of a clearly identified candidate. *See* AFC Br. 41-42. When "political committee" is construed as suggested, Section 9012(f) does not reach issue-oriented groups but only those organizations whose activities are "by definition, campaign related." *Buckley*, 424 U.S. at 79. There is thus no need to examine the products of their expenditures to determine whether they use words of express advocacy in order to ensure that the purposes of the statute are served. This conclusion parallels the differing approaches that *Buckley* followed in construing the scope of the FECA disclosure provisions for "political committees" on the one hand and for individuals and groups that were not "political committees" on the other." *See id.*; *compare id.* at 79-81.

didate . . . ." 424 U.S. at 79.[52] The Court has also recognized the line between a "political committee," which raises money from outsiders, and a group of individuals who pool their money and control its disbursement so as to express views that the individuals hold in common. *California Medical Association* expressly noted that contributions to political committees differ from "expenditures made jointly by groups of individuals in order to express common political views." 101 S. Ct. at 2722 n.17.[53]

Congress has long used the term "political committee" as a means of drawing "distinctions between political campaigning and other activities."[54] Indeed, the legisla-

---

[52] *See* CC Br. at 41 n.68. For all of their misplaced emphasis on the supposed breadth and vagueness of Section 9012(f), none of the appellees' briefs discussed the definition of "political committee" in *Buckley* or our suggestion that it should control the meaning of Section 9012(f).

Since 1976, lower federal courts have relied on the *Buckley* construction of "political committee" as establishing limits on the Commission's regulatory authority. *FEC v. Machinists Non-Partisan Political League*, No. 80-1136 (D.C. Cir. May 19, 1981), Slip. op. at 23-25; *FEC v. Florida For Kennedy Committee*, 492 F. Supp. 587 (S.D. Fla. 1980).

[53] The distinction between expenditures by "political organizations" and expenditures by individuals (acting singly or jointly) or other organizations has to be made for purposes independent of Section 9012(f). Under Section 527 of the Internal Revenue Code, "political organizations" receive favorable tax treatment. They are defined by a primary purpose test essentially identical to the one we have urged for political committees under Section 9012(f). *See* I.R.C. §§ 527(e)(1), (2) (1976).

[54] Discussing the use of the term "political committees" in the Federal Corrupt Practices Act, the House Special Committee to Investigate Campaign Expenditures noted in 1945:

> "In thus defining the categories of organizations and individuals required to report, and the kinds of receipts and expenditures to be reported, the Congress naturally used lan-

tive history of the Fund Act confirms that Congress sought to draw that line when it rejected Senator Taft's proposal to include all groups of whatever kind within Section 9012(f). In the colloquy quoted at pages 9-11 *supra*, it is apparent that both Senator Taft and Senator Pastore thought the term "political committee" meant a specific and traditional kind of organization and that there were corporations, labor organizations, associations, and other committees and groups that would not be covered by the term "political committee." The entire debate between Senator Taft and Senator Pastore was about whether the section should be amended to reach other organizations, like "a committee of faculty members say at Columbia University," which both Senators agreed were not political committees. Thus Senator Pastore assured Senator Magnuson that a group of people who "hire[d] a hall for a mass meeting" or who "spread out on election day to go to the polls to support Mr. A" would not be covered.[55] Conversely, every Senator in the 1971 debate would have recognized appellees as "political committees."

Because the "commonly accepted sense" of the term "political committee" eliminates any problem of vagueness and makes the statute constitutionally definite, "this Court is under a duty to give the statute that construc-

---

guage designed to exclude organizations and activities of a social, charitable, religious, patriotic, civic, or educational—as distinguished from a political—character." H.R. Rep. No. 78-2093, 78th Cong., 2d Sess. 7 (1945).

[55] 117 Cong. Rec. 42626 (Nov. 22, 1971) (Senators Magnuson and Pastore). Senator Pastore added "So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will." *Id.*

tion." *United States v. Harriss*, 347 at U.S. 618.[56] As the Court held in sustaining the Federal Regulation of Lobbying Act against First Amendment attack, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *Id.* at 618.[57]

When the term "political committee" is given its "commonly accepted sense," Section 9012(f) is not overbroad. It applies only to the kind of campaign activities Congress could constitutionally restrict. But "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally

---

[56] Rejection of appellees' vagueness challenge is especially warranted in light of the Commission's power to render advisory opinions. Under amendments enacted to cure the deficiencies noted in *Buckley*, 424 U.S. at 40 n.47, any person, entity or group may promptly obtain an advisory opinion. 2 U.S.C.A. § 437f(a)(1) (1981). The Commission's opinion that a particular activity is not prohibited insulates persons who rely on the opinion from liability. *Id.* § 437f(c). "When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is *pro tanto* reduced." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980). *Accord, id.* at 388, 389-90; *Civil Service Commission v. Letter Carriers*, 413 U.S. at 580; *Broadrick v. Oklahoma*, 413 U.S. 601, 608 n.7 (1973).

[57] As this Court has recognized, "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be a nice question.'" *Grayned v. City of Rockford*, 408 U.S. 104, 110 n.15 (1972), *quoting American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950).

proscribable. . . conduct . . . .'" *Parker v. Levy*, 417 U.S. 733, 760 (1974), *quoting Civil Service Commission v. Letter Carriers*, 413 U.S. at 580-81.[58]

2. *Section 9012(f) Is Not Underinclusive.*

Some of the appellees argue that Section 9012(f) is impermissibly underinclusive because of the exemptions in subparagraph (2).[59] But Congress has perceived since 1910 that "political committees" pose special problems for the integrity of the electoral process.[60] No comparable history suggests that broadcasters, periodicals, and organizations exempted from taxation under I.R.C. § 501(a) pose dangers comparable to those Congress saw in political committees.

Absent some facts, which appellees do not offer, there is no reason to think that these entities make expenditures of "the same innate character" or "pose[] the same danger" [61] as political committees. Nor is there anything

---

[58] *California Medical Association, supra*, confirms this rule in a context similar to the present one. There, amicus ACLU argued that the provision at issue "would violate the First Amendment if construed to limit the amount individuals could jointly expend to express their political views." 101 S. Ct. at 2722 n.17. Finding that the statute regulated a distinct set of transactions involving multicandidate political committees, the Court concluded that it "need not consider this hypothetical application of the Act." *Id.*

[59] FCM Br. 31-32; AEP Br. 34-38. It seems clear that Congress added these exemptions out of an abundance of caution. There is no reason to think that the organizations exempted by Section 9012(f)(2) would be considered "political committees" in any but the most unusual circumstances.

[60] Act of June 25, 1910, ch. 392, Pub. L. No. 274, 36 Stat. 822 (1910). President Roosevelt had called for legislation requiring disclosure of expenditures by political committees in 1904 and 1905. *See* 40 Cong. Rec. 96 (Dec. 5, 1905). *See also* Federal Corrupt Practices Act of 1925, ch. 368, Title III, 43 Stat. 1053, 1070 (1925).

[61] FCM Br. 31.

"bizarre" [62] about a conclusion that special threats are posed by organizations whose principal purpose is to advance a candidate's ends, and which concentrate aggregations of money from outsiders in the hands of a few managers who maintain control over them.

Appellees are also wrong in suggesting that Section 9012(f) impermissibly favors the wealthy individual.[63] Section 9012(f) is neutral on its face. *See Ross v. Moffitt*, 417 U.S. 600 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Because of the vast amount of money that political committees such as appellees can amass and control to benefit a candidate, they generally pose a much greater threat to the independence and integrity of publicly funded candidates than do individuals.[64] On the other hand, political committees do not further the interests of personal expression the First Amendment protects most strongly. Section 9012(f) is not unconstitutional because Congress did not legislate against every conceivable instance of the undue influence of wealth. The "statute is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

III. COMMON CAUSE'S APPEAL ON THE SUBSTANTIVE ISSUES IS PROPERLY BEFORE THIS COURT.

The Commission's contention that the Court has no jurisdiction over the substantive issues in *Common Cause v. Schmitt* [65] is plainly meritless.

---

[62] AEP Br. 35.

[63] *See* AFC Br. 35; *cf.* FCM Br. 20.

[64] *See* CC Br. 36-37. Appellees have not disputed this fact.

[65] FEC Br. as Intervenor-Appellee 8-11.

First, under the unusual circumstances of these cases the Court may, and should, decide both cases on the merits without deciding whether Common Cause's action was properly before the district court. Count I of the Common Cause complaint raises the same substantive statutory and constitutional issues as the Commission's complaint.[66] The same issues are raised by the two appeals and must be decided on the Commission appeal regardless of the action taken in the Common Cause case. *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 16 (1963), holds squarely that under these circumstances the Court may decide both cases on the merits without regard to the jurisdictional question presented in one.[67]

The *McCulloch* rule should be followed here. The Commission appears to agree.[68] If this Court reverses the judgments below in accordance with our submission, any continuing controversy over Common Cause's right to bring the action may be decided on remand.

Second, Count I of Common Cause's action and this appeal are authorized by the express words of 26 U.S.C. § 9011(b) (1976). This specific grant of private rights of action renders utterly irrelevant the Commission's reliance on *Cort v. Ash*, 422 U.S. 66 (1975), and similar cases discussing when a private right of action may be implied.[69] We addressed the other arguments now be-

---

[66] *See* 512 F. Supp. at 501, C.C. App. 25a.

[67] We think that the district court used the word "moot" to describe the *McCulloch* situation; it was saying that the issues raised by Count I of the Common Cause complaint were "moot" in the sense that they need not be separately decided rather than in the sense that a "case or controversy" had ceased to exist. A case does not become "moot" in the latter sense merely because the issue is governed by a previous decision of the same court.

[68] FEC Br. as Intervenor-Appellee 6.

[69] *See id.* 12-16.

latedly made by the Commission in our Opposition to Motions to Dismiss or Affirm filed prior to the noting of probable jurisdiction. To the extent necessary, we rely upon that discussion here.

CONCLUSION

For the reasons stated above and in our opening brief, the Court should reverse the judgment of the district court. If, however, the Court should find that the record is insufficient to support reversal of the judgment, it should vacate the decision below and remand the case for factual development.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
ROGER M. WITTEN
BRUCE E. COOLIDGE
CLIFFORD B. HENDLER
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Attorneys for Appellants Common Cause, David Cohen and Winifred Long

Of Counsel:
ARCHIBALD COX
KENNETH J. GUIDO, JR.
ELLEN G. BLOCK
DONALD J. SIMON
COMMON CAUSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 833-1200

September 29, 1981